"While in proceedings on motion for judgment for money under the statute, *supra,* the notice takes the place of both the writ and the declaration, and is viewed with great indulgence by the courts, this does not relieve the plaintiff of the requirement that he set out in his notice to the defendant matter sufficient to maintain the action."

In *Colley* v. *Summers Parrott Co.*,[3] the same rules as to the substantial sufficiency of the notice were reiterated, and in this case an allegation of debt on a "promissory note" was held sufficient to import the idea of negotiability.

It is manifest from the trend of the decisions and the recent holding of the present Supreme Court that the interest of the defendant may not be jeopardized by any indefiniteness in the plaintiff's allegation, which the latter might seek to excuse under the plea of a liberal construction of § 6040.

I. G. C.

EVIDENCE—HEARSAY—SPONTANEOUS DECLARATIONS NOT NECESSARILY PART OF THE RES GESTAE.—In the recent Virginia case of *Washington-Virginia R. Co.* v. *Deahl*,[1] which was an action by a passenger on an electric car for injuries received when the car on which she was riding collided with a motor truck, the Supreme Court of Appeals admitted the testimony of other passengers that *immediately after* the collision, the motorman stated to the driver of the truck, that this was the third time the driver had tried to pass in front of the car, and that he had gotten him. Under the circumstances the decision was undoubtedly correct, but the court stated that the declaration was admissible as part of the *res gestæ,* and the advisability of the use of this term in the connection is at least doubtful.

As is well known great confusion exists among the authorities as to the proper employment of the term *res gestæ.* The rule is frequently laid down that a declaration to be admissible under this principle must have been *contemporaneous* with the occurrence[2]—made "by the actor while acting". But on the other hand we have numerous cases in which statements have been admitted when made by the actor, or an outsider, immediately *after* the act, but while his mind was still controlled by the excitement occasioned by the occurrence.[3]

This apparent contradiction seems to be due to the failure of some of the courts, including that of Virginia, to recognize, expressly at least, that in the latter class of cases we have to do with a distinct exception to the Hearsay Rule, under which what

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[3] 119 Va. 439, 89 S. E. 906. [1] 126 Va. 141, 100 S. E. 840.

[2] 1 GREENLEAF, EVIDENCE, 16th. ed., § 108, p. 188.

[3] Dismukes *v.* State, 83 Ala. 287, 3 So. 671; State *v.* Horan, 32 Minn. 394, 20 N. W. 905; Virginia cases, *infra,* note 9.

are commonly called Spontaneous Declarations are admissible. This exception has no necessary logical connection whatever with the *res gestæ* principle in its truer and more limited sense, the statements being admitted because their spontaneity and automatic character insure their trustworthiness. The Virginia case above mentioned is a typical illustration of this exception, though the court has not called it by that name. Another well known instance was *Bedingfield's Case*,[4] where a woman rushed from a house, bleeding at the throat, and exclaimed, "Bedingfield cut me", dying soon afterwards. Here the court failed to recognize the exception, and excluded the exclamation, as being no part of the *res gestæ*. This case has, however, been much criticised, and is generally thought to be erroneous,[5] so that similar statements are now generally admitted, provided they were made under the influence of some startling shock, rendering the utterance spontaneous, and before there has been time for reflection to enable the declarant to contrive and misrepresent.[6]

In several earlier Virginia cases, declarations which might, at first glance, appear to be admissible under this principle have been excluded, the court invariably stating that they were no part of the *res gestæ*.[7] A more careful examination of these cases, however, would seem to indicate that in all of them the exclusion of the statements was probably proper,[8] either because too great a time had elapsed since the occurrence of the act to which the statement related, or because for other reasons there was a lack of that excitement, which is the cause of spontaneity and the guarantee of trustworthiness of this kind of evidence. But in the *Deahl Case* and a few others,[9] statements which should clearly be within the generally recognized exception for Spontaneous Declarations have been admitted as part of the *res gestæ*.

The topic is still further complicated by a confusion with the rule of agency that the declarations of an agent made within the scope of his employment, *dum fervet opus*, are a part of the *res gestæ* and bind the principal. In cases involving a statement

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[4] Reg. *v.* Bedingfield, 14 Cox Cr. C. 341.

[5] See article by Prof. J. B. Thayer, 14 AM. L. REV. 817; 15 AM. L. REV. 1.

[6] 3 WIGMORE, EVIDENCE, § 1750.

[7] Virginia, etc., R. Co. *v.* Sayers, 26 Gratt. 328 ("some time after"); Jammison *v.* Chesapeake, etc., R. Co., 92 Va. 327, 23 S. E. 758 ("shortly after"); Blue Ridge, etc., Co. *v.* Price, 108 Va. 652, 62 S. E. 938; Chesapeake, etc., R. Co. *v.* Parker's Adm'r., 116 Va. 368, 82 S. E. 183.

[8] But in Chesapeake, etc., R. Co. *v.* Parker's Adm'r., *supra*, the facts do not clearly appear; and the correctness of the decision in Blue Ridge, etc., Co. *v.* Price, *supra*, may be doubted. In the latter case the remark was made by a motorman of a car immediately after the accident in which the plaintiff was injured.

[9] Washington-Virginia R. Co. *v.* Deahl, *supra*; Little *v.* Com., 25 Gratt. 921 (about five minutes); Kirby *v.* Com., 77 Va. 681 (after running around house).

by a locomotive engineer as to the cause of an accident, when the statement is made shortly *after* the accident, the argument frequently turns on the admissibility of the statement as an *admission* by an agent, it being inadmissible unless made *dum fervet opus.*[10] But the real inquiry in such cases should be whether the circumstances were such as to make the statement a Spontaneous Declaration, and thus admissible under that exception to the Hearsay Rule. The two inquiries are indeed quite similar, but as an agent's admission the remark is admissible only when made while the act was *in progress,* while as a Spontaneous Declaration it is admissible even though made shortly *afterwards,* provided the excitement occasioned by the occurrence still prevailed over the mind of the speaker.

The leading case of *Vicksburg, etc., R. Co.* v. *O'Brien*[11] illustrates this confusion. Here a statement by a locomotive engineer was made from ten to thirty minutes after an accident. A majority of the court excluded it on the ground that, not having been made by the actor while acting, it was not a part of the *res gestæ,* and hence inadmissible as an admission by an agent. Four judges dissenting held that the statement should be received as a part of the *res gestæ.* So far as this argument is concerned, the majority clearly have the better of it, but it is possible that, under the circumstances, the statement might have been admissible as a Spontaneous Declaration.

In view of the general confusion as to the correct scope of the *res gestæ* principle, it is to be hoped that the Virginia Court will henceforth limit the use of the words to those cases where it is clearly applicable, if any such there be,[12] and when occasion next arises will adopt the more modern and more accurate term, Spontaneous Declaration. T. J. M., JR.

MASTER AND SERVANT—NEGLIGENCE WHERE USUAL APPLIANCES ARE SUPPLIED.—The opinions of the various courts of this country are hopelessly divided on the question of whether the

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[10] Vicksburg, etc., R. Co. *v.* O'Brien, 119 U. S. 99.

[11] *Supra.*

[12] "The phrase *res gestae* is, in the present state of the law, not only entirely useless, but even positively harmful. It is useless, because every rule of evidence to which it has ever been applied exists as a part of some other well-established principle and can be explained in the terms of that principle. It is harmful, because by its ambiguity it invites the confusion of one rule with another and thus creates uncertainty as to the limitations of both. It ought therefore wholly to be repudiated, as a vicious element in our legal phraseology. It should never be mentioned. No rule of evidence can be created or applied by the mere muttering of a shibboleth. There are words enough to describe the rules of evidence. Even if there were no accepted name for one or another doctrine, any name would be preferable to an empty phrase so encouraging to looseness of thinking and uncertainty of decision." 3 WIGMORE, EVIDENCE, § 1795.